APPENDIX C

PREJUDGMENT INTEREST ON FUTURE LOSSES

Summary of Majority and Minority Views

The Civil Practice Committee has considered and reconsidered the issue of whether prejudgment interest under *R.* 4:42-11(b) should be allowable on a verdict for future losses, both economic and non-economic. Although the Committee was unable to reach consensus, a majority favored allowing prejudgment interest on economic losses and an even larger majority favored allowing prejudgment interest on future non-economic losses. Accordingly, the majority recommends the clarifying rule change annexed hereto.

The divergent views of the Committee and the rationales supporting them are fully set forth in the majority, minority, and supplementary minority reports hereto annexed. The purpose of this memorandum is to briefly summarize those views.

There are several underlying premises for the majority view. The first is a matter of public policy, namely, that the allowance of prejudgment interest in tort cases promotes settlement. That was, of course, a primary purpose of the rule when adopted in 1972, and even though there is no hard data, and probably cannot be, conclusively demonstrating that settlements have been promoted by the rule, nevertheless the common perception is that that has been the case during our nearly thirty-year experience with prejudgment interest. It is the view of the majority that that purpose is equally promoted by allowing prejudgment interest on future losses as well as on past losses. The rule itself certainly makes no distinction between them.

The majority's second concern is more conceptual. Although it is true that as of the date of the verdict, plaintiff has not yet sustained future losses, nevertheless it is clear that the plaintiff is entitled, at that time, to a sum of money representing future losses, albeit discounted to some extent. The withholding of that sum of money is no different from the withholding of money representing damages already sustained by plaintiff. In both cases, it is money which the plaintiff has a present right to receive; which defendant has, therefore, a concomitant obligation to pay; and on which the defendant, by withholding the money, is able to earn income.

The majority's third reason is more practical. According to the trial judges on the Committee, the jury is not usually asked to find past and future non-economic damages separately and is ordinarily asked to find past and future loss of income separately only if so requested by an attorney. The trial judges are reluctant to make the verdict sheet and special interrogatories any more complicated than they already are by requiring what would be necessary additional discrete determinations, and the Committee's majority agreed.

The minority's objections to allowing prejudgment interest on future losses are explained in its summary annexed hereto. As understood by the majority, the main objection of the minority derives from the necessary discounting when such damages are awarded. That is to say, the jury is instructed that it is to award that sum of money which represents the capitalized value of the gross amount of future damages and is instructed on how to compute that discounted sum. The minority points out that the shorter the period for which

the gross amount is fixed, the lower the discount rate will be, and the lower the discount rate, then the higher the net amount. The minority thus argues that when plaintiff's recovery is delayed because of the time it takes to get through trial, the defendant is already penalized by having the disadvantage of the lower discount rate. Consequently, it is asserted, adding on prejudgment interest would constitute a double penalty.

The majority's mathematical response to this argument is two-fold. The first is that although it is true that the discount rate is lower as the period of time to be covered by the verdict decreases, by the same token, an offsetting function of the shorter period of time, in addition to reducing the discount rate, is also to reduce the gross sum for future loses to which plaintiff is entitled. The second is that, at least to some extent, the perceived "penalty" is offset by the ability of the defendant to earn investment income on the future-loss damage sum until it is actually paid.

There may well not be mathematical equality in these offsets as the minority insists and as many of the majority members of the Committee concede. The issue then is simply whether the extent of any residual mathematical inequality, by no means an easily calculable matter, is sufficient or sufficiently real to outweigh the public policy advantage of promoting settlement and avoiding further jury complexities. The majority concludes that it is not.

The reports annexed to this covering memorandum discuss in detail the issues raised here.

Minority Summary — Prejudgment Interest

The minority believes that awarding prejudgment interest on future lost wages has no economic rationale and does not encourage settlements.

Prejudgment interest is designed to make the plaintiff whole and to encourage settlement by eliminating any advantage to a defendant who delays payment. For example, if a plaintiff is owed $20,000 but is not paid until three years hence, plaintiff has lost the ability to earn interest on that money for three years, and defendant has had the advantage of earning interest on that money for the three years. Prejudgment interest corrects this inequity. Plaintiff is compensated for the delay in payment and any advantage defendant obtained in delaying payment is taken away. In this way, prejudgment interest encourages settlement since any incentive the defendant had to delay payment has been removed.

The award of prejudgment interest is unnecessary for future lost wages because the calculation of future lost wages under the New Jersey Model Civil Jury Charge 6.11(d)(2)(c) takes into account the delay in payment from the time of the injury until the verdict and compensates the plaintiff for the delay. Thus, an increase in the award due to the passage of time is built into the calculation of lost wages under the model jury charge. For example, suppose at the time the cause of action arose, plaintiff is owed the sum of $20,000 for future lost wages in the year 2010. If the case is not decided until three years later, under the model jury charge the plaintiff would be awarded a sum larger than $20,000. That larger sum takes

into account the passage of time. (A fuller explanation of how this works mathematically is set forth in the minority report).

Thus, the goals of prejudgment interest — making the plaintiff whole and removing any incentive for the defendant to delay payment — are automatically addressed by the jury's calculation of future lost wages. To award prejudgment interest on top of this sum represents a double payment due to the passage of time. It serves as a penalty to the defendant and a windfall to the plaintiff. Since adding prejudgment interest to future lost wages would create a windfall to the plaintiff, the minority believes this makes settlements less rather than more likely.

Lastly, while some of the trial judges noted that separating past and future lost wages could add complexity to the system, in fact the current model jury charge interrogatories for damages provide that the jury make a finding for past lost wages and a separate finding for future lost wages. (New Jersey Model Jury Charge 6.10B). The trial judges did not indicate that any problems have been encountered when the jury verdict sheet separates past and future lost wages.

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prepared January 11, 2002
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RECOMMENDATION IN FAVOR OF AWARDING PREJUDGMENT INTEREST ON FUTURE ECONOMIC AND NON-ECONOMIC DAMAGES

The question presented to the Civil Practice Committee is whether New Jersey should depart from its practice under R. 4: 42- 11(b) of awarding prejudgment interest on future economic and non-economic (i.e. pain and suffering) damages in tort actions. A clear majority of the Civil Practice Committee favored the award of prejudgment interest on future non-economic damages (16-8) while the members were equally divided on the question of whether interest should be permitted where future economic damages are involved (13-13). This report expresses the reasons why New Jersey should continue to award prejudgment interest on both categories of tort damages.

I. BACKGROUND

New Jersey first provided for the awarding of prejudgment interest by Court Rule in December, 1971. R. 4: 42- 11(b), which became effective on January 31, 1972, is similar to the present Rule and provided:

> Tort Actions. In tort actions, including products liability actions, the court shall include in the judgment interest at 6% per annum on the amount of the award from the date of the institution of the action or from a date 6 months after the date of the tort, whichever is later. The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

The Rule was promptly challenged as an invalid exercise of judicial authority but was sustained by the New Jersey Supreme Court. *Busik v. Levine*, 63 N.J. 351 (1973). The Court provided two policy bases for adoption of R. 4:42- 11(b) which remain relevant today. The first is compensation. "Interest is not punitive....; here it is compensatory, to indemnify the claimant for the loss of what the monies due him would presumably have earned if payment had not been delayed." *Busik*, 63 N.J. at 358 (Citation omitted). The second is judicial efficiency.

> "[T]here is also a public stake in the controversy, for tort litigation is a major demand upon the judicial system.

> Delay in the disposition of those cases has an impact upon other litigants who wait their turn, and upon the taxpayers who support the system. And here there is a special inducement for delay, since generally the claims are covered by liability insurance, and when payment is delayed, the carrier receives income from a portion of the premiums on hand set aside as a reserve for pending claims. Hence prejudgment interest will hopefully induce prompt defense consideration of settlement possibilities.

Busik, 63 N.J. at 359 (Citation omitted).[1]

The award of prejudgment interest on damages for future losses was directly challenged in *Ruff* v. *Weintraub*, 105 N.J. 233, 244- 246 (1987). There, the plaintiff was involved in a serious automobile accident and suffered substantial injuries. The jury awarded the plaintiff $650,000.00. The damages included $300,000.00 for lost wages (past and future), $50,000.00 in medical expenses and $300,000.00 for pain and suffering. The defendant challenged the award of prejudgment interest on both the economic and non-economic damages but the New Jersey Supreme turned the challenge aside. Though the matter was remanded for a retrial on the issue of damages, the Court directed that prejudgment interest be assessed on any damages found for future losses. In doing so, the Court recognized that "a compensation rationale for prejudgment interest may be questionable in the case of future losses, since it can be argued that those damages accrue after the judgment." *Ruff*, 105 N.J. at 245. The Court upheld the award of prejudgment interest on public policy grounds tersely observing that "....the public interest in encouraging settlements is an adequate independent basis for the application of the prejudgment interest rule...." *Id.* at 245.[2]

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[1] A recent survey of prejudgment interest finds that "the award of such interest is permissible in a significant and growing majority of states." Erich H. Gaston, When Prejudgment Interest Statutes and Insurance Policy Language Collide: Should Freedom of Contract Trump Legislative Intent?, *20* Quinnipiac L. Rev. 359 (2001). The many different enactments and rules are discussed in footnotes 4 and 5 of that Article. Of course a number of states still do not permit the award of prejudgment interest on tort awards finding them to be claims for unliquidated damages. See e.g. Love v. New York, 583 N.E. 2d 1296, 1296-1297 (N.Y. 1991)(prejudgment interest not recoverable under N.Y. C.P.L.R.)

[2] The Court asked that the issue of prejudgment interest on both economic and non-economic damages be considered by the Civil Practice Committee. No change in R. 4: 42-11(b) as it related to prejudgment interest for future damages was made by the Supreme Court based on that reference.

Recently, the issue of whether prejudgment interest is appropriate on an award for future lost wages (economic) damages was discussed by a panel of the Appellate Division in *McKeand v. Gerhard*, 331 N.J. Super. 122 (App. Div.), *certif. granted*, 165 N.J. 529 (2000), *appeal dism.*, 2001 WL 256392 (N.J. February 23, 2001). The Appellate Division observed that there was no support for the compensation rationale when dealing with future economic losses– they simply had not occurred as of the date of judgment so it could not be said that a plaintiff suffered a loss "of what the moneys due him would presumably have earned if payment had not been delayed." *Busik*, 63 N.J. at 358. Nevertheless, the Appellate Division sustained the award of prejudgment interest in cases involving economic damages noting that the public policy of "encouraging settlement[s]"was sufficient justification. The New Jersey Supreme Court initially granted certification but ultimately dismissed the appeal. The issue of prejudgment interest on future damages was sent to the Civil Practice Committee for its study and recommendations.

II. Prejudgment Interest Should Be Assessed For Both Future Economic And Non-Economic Damages

The question of whether prejudgment interest should be permitted for future economic and non-economic damages is a recurring one. As noted in the Background discussion, the allowance of prejudgment interest has been justified on compensatory and public policy grounds. In the case of future economic damages, the compensation justification has no basis.

In the case of non-economic damages it is less clear whether there is a compensatory element to the award of prejudgment interest. This is so because the award of non-economic damages such as pain and suffering is more a gestalt than a judgment separable into past, present and future components. The *Model Jury Charge (Civil) P 6.11F* instructs a jury "....to consider the nature, character and seriousness of any injury, discomfort or disfigurement. You must also consider their duration, as any award you make must cover the damages suffered by the plaintiff since the accident, to the present time, and even into the future if you find that plaintiff's injury and its consequences have continued to the present time or can reasonably be expected to continue into the future." The same charge, however, does not ask the jury to segregate this damage element but rather instructs the jury to "....award a lump sum of money that will fairly and reasonably compensate plaintiff for his/her pain, suffering, disability, impairment, and loss of enjoyment of life." *Id.* The charge plainly recognizes that there are so many variables in assessing such injuries that "....the task of equating ...(pain, suffering, disability and the loss of enjoyment of life with money)

so as to arrive at a fair and reasonable award of damages requires a high order of human judgment. For this reason, the law can provide no better yardstick for your guidance than your own impartial judgment and experience." *Id.* If non-economic damages cannot be meaningfully separated, then the delay in assessing them supports at least to some degree the compensatory goal of prejudgment interest.

The award of non-economic damages as a lump sum also has the virtue of simplicity. Public criticism of the jury system often centers on the variability of jury awards. Separating non-economic damages into past and future components is necessary if prejudgment interest may only be awarded for past non-economic damages. But such a requirement will doubtlessly increase the complexity of a jury's task. This can be expected, in turn, to increase the variability of jury awards of such damages. Loss of public confidence in the jury system obviously is a potential and undesirable consequence of insisting on such exactitude.

Obviously, the main rationale for awarding prejudgment interest on future damages is the public policy of encouraging settlements. As already noted, the New Jersey Supreme Court has articulated this policy over a 30 year period. New Jersey is hardly alone in finding this reason sufficient to justify the award of prejudgment interest on future economic and non-economic damages. Rhode Island has a statute on prejudgment interest much like R. 4: 42- 11(b). The Rhode Island Supreme Court, like New Jersey's, determined that its statute was enacted primarily "....not to add interest but to establish a device to encourage settlements of cases sounding in tort without undue delay." *DeMeo v. Philbin*, 502 A. 2d 825, 826 (R.I. 1986). The First Circuit, discussing the Rhode Island Court precedent almost a decade later, encapsulated that state's policy in favor of prejudgment interest for future damages in the face of a spirited attack:

> In arguing that the trial court erred in applying Rhode Island's prejudgment interest statute to future damages, ...(the defendant) maintains that "interest" is simply compensation for the loss of use of money, and that, "[i]n light of the common understanding of the term, only Humpty Dumpty would be brazen enough to assert that interest encompasses monies paid to compensate for the time-value of money that has not yet been expended...."

LaPlante v. American Honda Motor Co., 27 F.3d 731, 743 (1st Cir. 1994). The First Circuit, however, did not find Rhode Island's policy choices so difficult to fathom and

rejected the defendant's effort to set them aside:

> While it has provided us with a literary allusion, ...(the defendant) has chosen to ignore both the primary purpose of the Rhode Island prejudgment statute, and binding precedent that firmly establishes that the statute, which does not distinguish between past and future damages, means what it says, and says what it means. It follows that prejudgment interest was properly assessed on all future damages awarded to plaintiff.

LaPlante, 27 F. 3d at 744.

New Jersey and Rhode Island are not alone in permitting such awards. Many states have made similar policy conclusions with respect to the award of prejudgment interest on future economic and non-economic damages. *See e.g.* **Cal. Civ. Code** § 3291; *Bibun v. AT&T Information Sys., Inc.*, 16 Cal. Rptr. 2d 787 (1993) (prejudgment interest allowed on future damages); **Colo. Rev. Stat.** § 13-21-101(1); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993)(prejudgment interest is permitted on all forms of compensatory damages including future damages.); **La. Rev. Stat.** 13: 4203; *Tastet v. Joyce*, 531 So.2d 520 (La. 1988) (no difference between past and future damages for prejudgment interest purposes); **Mass. Gen. Laws** c. 231, § 6B; *Moose v. Massachusetts Inst.of Technology*, 683 N.E.2d 706 (Mass. 1997) (damages for loss of future earning capacity is subject to prejudgment interest); **Tex. Code Ann.(Vernon)**, Finance Code § 304.102; *C & H Nationwide v. Thompson*, 903 S.W.2d 315, 324-327 (Tex. 1994)(prejudgment interest on future damages is permitted under Texas statute).

It is true that many other states have decided not to permit prejudgment interest on future economic and/or non-economic damages. *See e.g.* **Ak. St.** 09.30.070 (prejudgment interest not permitted on either economic or non-economic damages); **Iowa Code** § 668.13 (prejudgment interest not allowed on future damages); **Minn. Stat.** § 549.09, subd. 1(b) (2) (no prejudgment interest for future damages); **Nev. Rev. Stat.**, 17.130 (no prejudgment interest on future damages); **SDCL** 21-1-13; *Meyer v. Dixon Brothers, Inc.*, 369 N.W. 2d 658, 661 (S.D. 1985)(statute which permits jury to assess prejudgment interest does not authorize such interest for non-economic damages). Many of these statutes were passed in the late 1980's and early 1990's. These states have chosen to emphasize the compensatory objectives furthered by the award of prejudgment interest over the public policy objectives chosen by states such

as New Jersey.

The public policy intuition that an award of prejudgment interest helps settle cases has much to recommend it. R. 4: 42- 11(b) provides for the award of prejudgment interest at somewhat above the risk-free interest rate. This spread is sufficient to discourage insurance carriers from investing reserves while at the same time not providing such a windfall so as to discourage plaintiffs from engaging in meaningful settlement discussions. R. 4:42- 11(b) also excludes the plaintiff's lawyer from sharing any of the prejudgment interest award. This provision is designed to minimize any incentives for the plaintiff's attorney to delay or prolong the underlying litigation.

Tax considerations also give support to the policy intuition that the award of prejudgment interest encourages earlier settlements. Prejudgment interest is taxable income. 26 **U.S.C.** §§ 61& 104 (a)(2); *Rozpad v. I.R.S.*, 154 F.3d 1, 5-7 (1st Cir. 1998). Hence any award for past or future damages will be taxed. To the extent that prejudgment interest on future damages is viewed as a windfall, it will be reduced through income taxation. On the other hand the insurance carrier or other defendant must pay the pre-tax amount. Of course the defendant may itself take a tax deduction for such payments. But the tax point to be made is that damage payments and prejudgment interest are both deductible to the defendant but only the prejudgment interest is taxable to the plaintiff. The award of prejudgment interest, including that for future damages, causes the defendant's costs to rise relative to those of the plaintiff. And the longer the matter proceeds before judgment the greater the differential.

Empirical evidence does not contradict the policy intuition that the award of prejudgment interest helps encourage settlements.[3] An in depth examination of the problem of congestion in the civil courts was undertaken by Professor George L. Priest

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[3]Judge Richard A. Posner, one of the founders of the school of law and economics, has studied the settlement-litigation decision and has characterized it as an inequality (Pp-Pd) J> 2(C-S): where Pp and Pd represents the respective party's assessments of success; J equals the size of the judgment if plaintiff wins; and, C and S are the costs to each party of litigation and settlement respectively. Richard A. Posner, **Economic Analysis of Law**, 609-612 (5th Ed. 1998). Judge Posner has argued, but without convincing evidence, that prejudgment interest is likely to reduce the likelihood of settlement by increasing the litigation stakes. Posner cites Hans Zeisel, Harry Kalven, Jr. & Bernard Buchholz, **Delay in the Court**, 133-136 (1959). These authors were pioneers in the empirical study of congestion in the courts. However their work was largely based on the study of the New York court system which did not then and does not now award prejudgment interest on tort recoveries.

using data developed in Cook County, Illinois (Chicago) between 1959 and 1979. Professor Priest found that various efforts at reform in the Cook County system failed to produce a less congested trial docket. He concluded that litigation delay was not significantly associated with the number of judges, the caseload per judge or the composition of the caseload. Rather, Professor Priest suggested that a natural equilibrium existed which would prevent court congestion from being eliminated. As congestion was reduced through the addition of judicial or other resources, the time to trial would shorten and more litigants would be willing to proceed to trial thereby reversing the process. George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. Rev. 527 (1989). The role of prejudgment interest in encouraging settlements however was not studied because the Illinois courts do not permit the award of prejudgment interest in tort cases.

The timing of settlements has also been examined by social scientists in the late 1980's and into the 1990's using game theory and other empirical models but the role of prejudgment interest in encouraging settlements was not explicitly examined. See e.g. Thomas J. Miceli, *Settlement Delay As A Sorting Device*, 19 Int'l Rev. L. & Econ. 265 (1999); Gary M. Fournier and Thomas W. Zuehike, *The Timing of Out-Of-Court Settlements*, 27 Rand J. Econ. 310 (1996)[4]; K. E. Spier, *The Dynamics of Pretrial Negotiation*, 59 Rev. Econ. Studies 93 (1992). These models generally showed that settlement was positively associated with delay and negatively associated with an increase in litigation stakes. But these models did not contradict the policy intuition that the provision for prejudgment interest as set forth in **R.** 4:42-11(b) aided in securing earlier settlements.

III. CONCLUSION

The award of prejudgment interest for future economic and non-economic damages has been the law in New Jersey for close to 30 years. During that period the policy has been periodically reviewed and our courts have concluded that the policy furthers the important goal of encouraging early settlement of tort cases. New Jersey's policy is consistent with those of many other states, including the two (2) largest states by population in the United States-- California and Texas. The policy has common

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[4] Fournier and Zuehike found that fee shifting statutes had the effect of increasing trials. However, fee shifting and the award of prejudgment interest are quite different. The latter is solely a function of time while the former is dependent on litigation activity. Of course, the policy behind fee shifting is to encourage the bringing of certain suits which are believed to be in the public interest.

sense support and no empirical evidence contradicts it. In short, there is no reason to change New Jersey's policy and the majority of the Civil Practice Committee recommends that **R.** 4: 42- 11(b) and the case law interpreting it remain unchanged.

REPORT TO JUDGE PRESSLER RE PREJUDGMENT INTEREST

Prejudgment Interest Should Not Be Allowed for Future Lost Wages or Future Medical Expenses

The Supreme Court asked the Civil Practice Committee to review and make recommendations on whether prejudgment interest on future lost wages and future pain and suffering damages should be allowed. While the majority of the Committee recommends that prejudgment interest be allowed on future pain and suffering, the Committee was equally split on the question of whether prejudgment interest should be allowed for future lost earnings. Set forth below is the report on behalf of those who believe that NO prejudgment interest be awarded for future lost earnings.

With respect to future pain and suffering, a number of members believe that a valid distinction can be made between future lost earnings and future pain and suffering. They would ALLOW prejudgment interest for future pain and suffer-ing. The argument in favor of this position is set forth below. Others take the logical position that prejudgment interest should NOT be awarded on any future damages, includ-ing future pain and suffering. Attached please find the memorandum of June 7, 2001 by Michael Stein, Esq. in support of this position.

While the Civil Practice Committee did not address the issue

of future medical expenses, the writers of this report believe that for the reasons set forth below, prejudgment interest should NOT be awarded for future medical expenses.

The Court is well aware of its decision in Ruff v. Weintraub, 105 N.J. 233, 245-46 (1987), which held that prejudgment interest should be awarded on damages for both past and future losses. However, New Jersey apparently is in the distinct minority on this issue, as the research provided to us concludes that "There are only a few states that permit an award of prejudgment interest on future losses."[1] Today in New Jersey, the standard jury interrogatories typically request the jury to determine the following damages: (1) (all) pain and suffering; (2) past medical expenses; (3) future medical expenses; (4) past lost wages; and (5) future lost wages. Model Civil Jury Charge, 6.10B.

1. Future Lost Wages

Prejudgment interest should not be awarded for future lost wages because the calculation of future lost wages, under the New Jersey Model Jury Charge §6.11(d)(2)(c), takes into account the delay in payment from the time of the injury until the verdict and compensates the plaintiff for that delay. To add prejudgment interest on top of this would result in a windfall to the plaintiff and a penalty to the defendant.

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[1] Mary F. Rubenstein's March 15, 2001 memo, p. 8.

The purpose of prejudgment interest is to compensate the plaintiff for the delay in payment from the time of the injury until the verdict. Ruff v. Weintraub, supra, at 244-45. It is part of the effort to make the plaintiff whole. Awarding prejudgment interest also encourages settlement in that the defendant has no incentive to delay payment in order to have the use of the money. Id. at 245. However, the Court acknow-ledged that "the applicability of a compensation rationale for prejudgment interest may be questionable in the case of future losses...."

Plaintiffs typically present an economic expert who calculates the lost wages up to the date of trial as well as the present value of future lost wages. That present value is the sum which, if awarded to the plaintiff and invested in a risk free investment, would pay plaintiff's future wages up to the time of retirement.

For example, suppose an accident takes place in 2000, and the proofs show that in the year 2010 plaintiff would have earned $60,000. The sum of money that needs to be paid in 2000 in order to generate the sum of $60,000 in 2010 we will assume is $40,000. If damages were awarded in 2000, plaintiff would receive $40,000 in full compensation for the lost wages in year 2010 and no prejudgment interest would be awarded.

Now, if the damage award were made four years later, the

amount of the award would represent the sum of money needed in 2004 to generate $60,000 in 2010. That sum would be greater than the amount needed in 2000, but less than $60,000. For example, the award in 2004 might be $48,000 for future lost earnings for the 2010 year. In other words, plaintiff will receive more money for the lost wages for the year 2010 if the case is tried in 2004 than if it is tried in 2000.

If the award were further delayed, say it was not made until 2006, then even a larger sum would have to be paid to plaintiff to compensate for the loss of earnings in 2010.

As we previously said, our current model jury charges explicitly tell the jury to discount the future lost wages to a present value lump sum of money. Model Civil Jury Charges Damages §6.11(d)(2)(c). Thus, the jury's verdict explicitly awards a present value figure that will fully compensate the plaintiff for his/her future lost wages at the time of trial.

Accordingly, we believe that there is no justification for awarding prejudgment interest for future lost wages for several reasons. First, mathematically the present value of the future lost wages at the time of trial fully compensates the plaintiff for all future lost wages.[2] Adding prejudgment interest to that

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[2] In Jones, supra, the U. S. Supreme Court stated that "it is both easier and more precise to discount the entire lost stream of earnings back to the date of the injury... . The plaintiff may then be awarded interest on that

amount would create a lump sum award that would exceed plaintiff's future lost wages and, thus, create a windfall to the plaintiff. Second, the current jury interrogatory already asks the jury to separate past and future lost wages and thus no complexity is added to the existing system. Third, the jury is currently instructed to discount the future lost wages to a present value.

Also, we feel that providing too great a windfall to the plaintiff will discourage settlements. In other words, plaintiffs may be less inclined to settle cases if they believe that by going to trial they can obtain sums in excess of what their actual losses are.

Lastly, there is no incentive for a defendant to delay settlement for future lost wages because the present value for any given future year will increase as the case gets older. Thus, awarding prejudgment interest on future lost wages has no economic rationale, does not compensate the plaintiff for loss of income that would have been earned on the judgment had it been paid earlier, does not benefit the defendant by being able to use the money during the pendency of the trial, and does not encourage settlements.

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discounted sum for the period between the injury and judgment." In that case and going back to our example, plaintiff would be awarded $40,000 for the year 2010 lost wages regardless of the date of trial and prejudgment interest would then be appropriate.

Attached is an analysis of prejudgment interest for future damages by Joseph Eisen, an accountant. This analysis conclusively establishes that, due to the method of calcula-ting future lost earnings, allowing prejudgment interest would constitute a windfall to plaintiff.

2. <u>Future Pain and Suffering</u>

The jury is not asked to separate past and future pain and suffering, but rather to award one lump sum for all pain and suffering. Typically, the plaintiff testifies at trial as to the pain and suffering that (s)he has experienced up to the time of trial with particular emphasis on the pain and suffering that the plaintiff continues to experience. The plaintiff's doctor then opines as to the diagnosis and prog-nosis and what may be expected for future pain and suffering. Of course, the jury charges on pain and suffering do not discuss in any way discounting the future pain and suffering to a present value or any similar considerations that the jury should consider in rendering a lump sum award for pain and suffering damages.

We believe that prejudgment interest could be awarded for future pain and suffering damages. The current standard jury interrogatory does not separate pain and suffering into past and future damages. It could add complexity to the jury interrogatories by requiring that pain and suffering damages be broken down into past and future damage awards. Also, the jury

instructions do not deal with computing future pain and suffering on a present value basis. Moreover, intuitively this is a difficult concept to comprehend, let alone tell the jury how to compute. Notwithstanding that our instinct and inclination is to recommend adding prejudgment interest to an award of pain and suffering damages, we would suggest that the Supreme Court's evaluation of this particular question might benefit from some additional research concerning the practical ramifications, if any, on settlement and trial practice stemming from decisions by other jurisdictions to disallow prejudgment interest on this component of damages.

3. Future Medical Expenses[3]

Plaintiffs typically present evidence as to the actual medical expenses up to the time of trial. With regard to future medical expenses, plaintiffs typically present a doctor's testimony as to what the future medical expenses would be if those medical services were rendered at or about the time of trial. In other words, there typically is not any evidence presented as to the present value of the future medical expenses, but rather the current costs to provide those medical services in the future. In

[3] N.J.S.A. 39:6A-12 prohibits the amounts collectible or paid pursuant to the personal injury protection coverage of an automobile insurance policy from being introduced into evidence. Thus, medical expenses generally are not relevant in a personal injury action involving an automobile accident.

effect, plaintiff's evidence on future medical expenses assumes that the interest and inflation rates will offset each other.

Although the Court did not specifically ask the Committee to address future medical expenses -- and they typically are a minor portion of a total jury award -- the discussion with respect to future lost wages is equally applicable to future medical expenses. The standard jury interrogatory specifi-cally asks the jury to separate past and future medical expenses. Additionally, in effect, plaintiffs typically present the present value of future medical expenses at the time of trial. Accordingly, for all the reasons set forth with regard to future lost wages, there is no rationale for awarding prejudgment interest on future medical expenses.

Respectfully submitted,

Amy P. Chambers, P.J.S.C.
Michael S. Stein, Esq.
Thomas P. Weidner, Esq.

TPW:ncv

M E M O R A N D U M

TO: Honorable Amy P. Chambers, P.J.S.C.
Thomas P. Weidner, Esq.

FROM: Michael S. Stein, Esq.

SUBJECT: Civil Practice Committee Review of Rule 4:42-11(b)

DATE: June 7, 2001

Pre-judgment interest on liquidated damages was allowable at common law in New Jersey on equitable grounds. In 1971, R. 4:42-11(b) was adopted, specifically allowing pre-judgment interest on damage awards in tort actions (which are usually unliquidated). In fashioning a rationale for construing this court rule, the Court in Busik v. Levine, 63 N.J. 351 (1973), continued to rely on the "equitable purpose of such an award [i.e., of pre-judgment interest]; namely, 'to indemnify the claimant for the loss of what the moneys due him would presumably have earned if the payment had not been delayed.'" Preston v. Claridge Hotel & Casino, Ltd., 231 N.J. Super. 81, 90 (App. Div. 1989) (citing Ellmex Const. Co., Inc. v. Republic Ins. Co. 202 N.J. Super. 195, 212-213 (App. Div. 1985) (quoting Busik, supra, 63 N.J. at 358)). Thus, under the holding of Busik, as interpreted by Preston and Ellmex, the primary rationale of R. 4:42-11(b) is still the same as the original equitable purpose of awarding pre-judgment interest at common

law in New Jersey, which is that of making whole the plaintiff while doing justice to both of the parties.

Most courts and legal scholars agree that the primary purpose of pre-judgment interest is compensatory. In Busik v. Levine, 63 N.J. 351 (1973), the New Jersey Supreme Court began its analysis of the issue by noting that an award of interest is not punitive.[1] Id. at 358; see Kotzian v. Barr, 152 N.J. Super. 561, 565 (App. Div. 1977), rev'd in part on other grounds, 81 N.J. 360 (1979); Maynard v. Mine Hill Tp., 244 N.J. Super. 298, 303 (App. Div. 1990). The Court then stressed the compensatory rationale underlying pre-judgment interest in construing the purpose underlying R. 4:42-11(b). Busik, supra, 63 N.J. at 358-361; see Kotzian, supra; Heim v. Wolpaw, 271 N.J. Super. 538 (App. Div. 1994). In addition, the Court went on to hold that beyond providing compensation to the plaintiff for the loss of use of money due him, the rule serves the function of promoting earlier settlement of tort litigation. Busik, supra, 63 N.J. at 359-360; see Kotzian, supra, 152 N.J. Super. at 565-566; Espin v. Allergan Pharmaceutical, Inc., 127 N.J. Super. 496, 471 (Law

[1] This distinction is critical because even at common law, in some jurisdictions there was a punitive component to the awarding of pre-judgment interest as damages for the willful withholding of moneys due and owing (to punish a dilatory debtor). See Martin Oyos, Comment, Prejudgment Interest in South Dakota, 33 S.D. L. Rev. 484, 486-487 (1988). In addition, there is an undeniably punitive aspect to awarding pre-judgment interest on future damages as an incentive to early settlement. Thus, the Busik opinion, in denying any punitive intent to the awarding of pre-judgment interest, would seem to prohibit any such award the effect of which could be said to be punitive.

Div. 1973). Finally, the Busik Court ruled that awarding pre-judgment interest on future damages was allowable under the rule. Busik, supra, 63 N.J. at 360.

In 1982, eleven years after the adoption of R. 4:42-11(b), the situation in New Jersey with regard to the awarding of pre-judgment interest on tort damage awards was summed up in noteworthy fashion in a law review comment as follows:

> The New Jersey courts have taken an approach different from Alaska's, but the results and underlying rationale are substantially the same. Whereas the rest of the states have statutes which prescribe the circumstances under which the exaction of interest is legal, New Jersey has judge-made rules to determine the appropriateness of interest, except for statutes regulating usury. Pursuant to this common law authority, the state supreme court promulgated Rule 4:42-11(b) to provide for prejudgment interest. The text of the rule indicates that it applies only to tort actions, and that the interest begins to run not at the date the action accrues, but either when the plaintiff files a complaint or six months after the date of the tort, whichever is later.
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> The rule received its first significant elaboration in Busik v. Levine. The court stated that interest "is compensatory as to the parties and represents 'damages' for delay in payment." This definition emphasizes that, in matters of interest, the perspective of the claimant is paramount. Since prejudgment interest has no punitive goals, nothing turns on the actions or bona fides of the defendant.
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> As the Alaska court had done earlier, the New Jersey court rejected the distinction between liquidated and unliquidated claims: "The fact remains that in both situations . . . the plaintiff has not [had the use] of moneys which the judgment finds was the damage plaintiff suffered. This is true whether the contested liability is for a liquidated or an unliquidated sum." The court also noted that its rule was likely to

induce prompt and constructive settlement negotiations.

New Jersey courts generally recognize the efficacy of the rules announced in Busik. The decisions emphasize that the twin goals of mandatory prejudgment interest awards are to promote settlements and to compensate plaintiffs for the loss of use of their damage awards between the time of injury and the time of judgment. Other developments in New Jersey case law, however, indicate that the Busik principles have not received unanimous approval within the New Jersey court system. The same year the New Jersey Supreme Court decided Busik, a lower court in Espin v. Allergan Pharmaceutical, Inc. also had an opportunity to implement Rule 4:42-11(b). Though the rule speaks in mandatory terms, the court carved out an exception to the application of prejudgment interest when delay arises from a plaintiff's inability or unwillingness to proceed to trial. Unfortunately, this exception marked a retreat from the Busik court's position that prejudgment interest is necessary for full compensation. The court seemed to emphasize the prosettlement rationale for prejudgment interest at the expense of the compensation rationale. The Busik court, on the other hand, had stressed the importance of compensation, mentioning the settlement rationale almost as an afterthought.

The court in Espin thus entrenched the wrong rationale. Even if the plaintiff willfully refrains from filing suit, the defendant still has the use of the money value of the damages he inflicted on the plaintiff from the time of the injury to the time of judgment. In addition, plaintiffs who delay filing their suits already face the twin barriers of statutes of limitations and the doctrine of laches. Furthermore, judges have sufficient supervisory authority over their dockets to assure timely prosecution of litigation and to impose sanctions for egregious behavior. Interest law need not serve a punitive function for either plaintiffs or defendants.

After the Espin case, the New Jersey rule was amended to provide that "in exceptional cases the court may suspend the running of such prejudgment interest." Though the courts have not interpreted the amendment as eliminating prejudgment interest, the amendment is

> a step back from the compensatory guidelines enunciated in Busik. The exception in Rule 4:42-11(b) has been extended to the point where one court has merely stated, without further discussion, that the award of interest "is a discretionary matter and is denied." Thus, some New Jersey courts have abandoned the clear mandate of the rule and the policy considerations of the Busik court for the discretionary approach, with all its concomitant analytical deficiencies. The intellectual foundations supporting mandatory prejudgment interest, consistently affirmed in jurisdictions such as Alaska, have not been upheld in New Jersey. Nonetheless, the Busik decision remains one of the leading examples of proper judicial analysis of the prejudgment interest issue.

Anthony E. Rothschild, Comment, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192, 211-213 (1982) (footnotes omitted).

The world described by Rothschild in 1982 was irrevocably changed in 1987 when the Court handed down its decision in Ruff v. Weintraub, 105 N.J. 233 (1987). His critique of Espin almost seems to forewarn the advent of the opinion in Ruff and is all the more fitting thereto. In Ruff, the Court retreated from the Busik Court's position on the primacy of the compensatory rationale, emphasizing the pro-settlement rationale for pre-

judgment interest at the expense of the compensation rationale.[2] The Court in Ruff found that the "applicability of a compensation rationale for prejudgment interest may be questionable in the case of future losses" because "those damages accrue after judgment." The Court held, however, that "the public interest in encouraging settlements is an adequate independent basis for the application of the pre-judgment interest." Ruff, supra, 105 N.J. at 245.

Thus, under Ruff, even where an award of interest fails to fulfill the compensatory function of putting the parties in the same positions as they would have been had the judgment been paid at the time of accrual, it may still be sustained and will not be disallowed as an "exceptional case" under R. 4:42-11(b)

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[2] The Ruff opinion also represents a departure from Busik in its less than enthusiastic endorsement of the appropriateness of assessing pre-judgment interest on future damages. As Judge (now Justice) Long wrote in Statham v. Bush, 235 N.J. Super. 607, 618 (App. Div. 1992):

> It has not escaped our attention that the Supreme Court's unequivocal approval of the applicability of prejudgment interest to future losses as expressed in Busik, has given way to a less than enthusiastic imprimatur in Ruff where, the applicability of the compensation rationale for prejudgment interest on future losses was characterized as "questionable" and the entire issue as presented here by defendants was deemed "significant." 105 N.J. at 245, 246 n.6. This may portend a future change of heart on this issue.

In fact, the Ruff Court, at footnote 6 of its opinion, referred the matter of awarding pre-judgment interest for future damages to the Civil Practice Committee, citing Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 538 n.22, 103 S. Ct. 2541, 2551 n.22, 76 L. Ed. 2d 768 (1983). In that case, "the United States Supreme Court suggested that prejudgment interest on a stream of earnings would be appropriate if those earnings were discounted back to the date of injury rather than the date of judgment." McKeand v. Gerhard, 331 N.J. Super. 122, 124 (App. Div. 2000) (citing Jones & Laughlin Steel, supra, 462 U.S. at 538 n.22, 103 S. Ct. at 2551 n.22, 76 L. Ed. 2d at 784 n.22).

if it bears some rational relationship to the rationale of encouraging settlement. Ruff is especially significant because it establishes for the first time that the two purposes for the rule stated in Busik -- compensation and encouraging early settlement -- are of equal importance in deciding the legitimacy of an award. In doing so, Ruff strays from Busik, where the Court took great pains to incorporate as much of the traditional equitable underpinning to pre-judgment interest law in New Jersey in its dual rationale, and where the primacy of the compensatory purpose of such interest was never in doubt.

Both Busik and Ruff contain flaws in reasoning, I believe, regarding their analyses of the future damages question. In Busik, the Court, when presented with the question of whether pre-judgment interest should be awarded on future damages, wrote:

> We see no strength in the assertion that the allowance of interest duplicates some element of damage or constitutes a payment with respect to damages not yet experienced. The jury is not instructed to add interest to its verdict in tort cases. In any event an instruction to the jury can obviate the risk. And with respect to the criticism that a verdict may embrace losses not yet suffered, the answer is that a verdict necessarily anticipates future experience, and the interest factor simply covers the value of the award for the period during which the defendants had the use of the moneys to which plaintiffs are found to be entitled.

Busik, supra, 63 N.J. at 360. Unfortunately, the Court errs in thinking that if the jury does not add interest to its verdict that there can be no double recovery. In fact, if a jury fixes its award of future damages as of the time of trial and discounts the award only to that date rather than to the date for the commencement of liability for interest set forth in R. 4:42-11(b), then the jury has, in effect, already included interest in its award covering the time period from the date accrual begins (as set by the rule) until the time of trial. Thus, the addition of pre-judgment interest in that case would represent a double recovery. With respect to the Busik Court's statement that pre-judgment interest on damages not yet suffered at the time of trial simply covers the value of the use of the moneys to which the plaintiff was entitled from the date of accrual date, the Court again misses the point that unless the award of future damages is discounted to the time set by the rule for the accrual of interest to begin,[3] adding pre-judgment interest will result in a double recovery overcompensating the plaintiff.

[3] As suggested in Jones & Laughlin Steel, supra (cited in Ruff, supra, 105 N.J. at 246 n.6).

It is clear that the Court in Ruff was troubled by the reasoning in Busik and therefore not only questioned the applicability of the compensation rationale for pre-judgment interest in the case of future losses but also specifically pointed with approval to the U.S. Supreme Court's suggestion in Jones & Laughlin Steel to instruct juries to discount future damages back to the date of injury rather than the date of judgment. Ruff, supra, 105 N.J. at 245-246. Yet it was unwilling to take the next logical step and prohibit pre-judgment interest on future damages that were discounted only to the date of judgment, instead relying on the settlement incentive rationale of Busik to justify such awards.

But Ruff's reliance on this secondary policy reason for R. 4:42-11(b), that of encouraging early settlement, is itself flawed on two counts: first, in its reliance on the assumption that awarding pre-judgment interest on future damages will actually induce the prompt settlement of tort cases and not cause plaintiffs to delay settlement, contrary to what the economic model of pre-judgment interest would predict; and second, in its failure to address the question of whether an award that admittedly overcompensates the plaintiff runs afoul of the caveat in Busik that interest awards not be punitive.

Under the pre-judgment interest theory generally accepted by a majority of jurisdictions nationally, pre-judgment interest is a means of achieving full compensation for the plaintiff.[4] According to this rationale, based as it is on an economic model of the function of interest in general, pre-judgment interest is to be assessed only to the extent that the plaintiff is fully compensated, no more, no less. It is this standard that Judge Pressler alluded to when she wrote that the "effect of the interest award, therefore, [should be] to place both parties in exactly the same position each would have been in, without loss to either, had the plaintiff's claim been promptly paid." Kotzian, supra, 152 N.J. Super. at 565. In order to be compensated adequately, "the plaintiff should recover as prejudgment interest the same amount he would have earned had he

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[4] This concept has been explained by one commentator as follows:

> This loss theory recognizes implicitly that the "inherent income-producing ability of money cannot be separated from money itself." Since money has a "use" value of which the plaintiff has been deprived between the time his cause of action accrued and judgment, full compensation of his loss must include an amount for this foregone use of his money. This notion is in accord with the tort concept of damages, to return the plaintiff to his former position, and with the similar contract concept, to place the plaintiff in the same position he would have been in had the defendant performed.

H. Deane Wong, Comment, Prejudgment Interest: Too Little, Too Much, Or Both? 10 UCLA-Alaska L. Rev. 219, 224 (1981). See also Robert J. Sergesketter, Comment, Intepreting Inequities: Bringing Symmetry and Certainty to Prejudgment Interest Law in Texas, 32 Hous. L. Rev. 231, 239-241, 264 (1994).

had the opportunity to invest those funds during the applicable time period." Wong, supra (note 1), 10 UCLA-Alaska L. Rev. at 229.

The goal of putting the parties in the exact same economic positions as they would have been had payment occurred as of the day the damages accrued is based not only on the equitable principles of fairness and justice to the parties, but also on the theory that by avoiding the unjust enrichment of either of the parties, all possible economic incentives for either side to delay settlement are removed. Tilting the balance in the direction of either litigant will create the potential for a windfall, providing one of the parties with an increased incentive for delay. This factor is crucial to the economic model of pre-judgment interest. In fact, under this theory, the only point at which the twin rationales of inducement to settle and fair and just compensation overlap (and are not actually at cross purposes with each other) is where pre-judgment interest puts neither party in a better position than he or she would have been in if the judgment had been paid at the time that it was due (i.e., where pre-judgment interest is awarded at the market rate and is suspended on future damages) so that neither plaintiffs nor defendants have any economic incentive to delay settlement.

Thus, the key to inducing early settlement according to the purely economic model of pre-judgment interest is in minimizing the unjust enrichment of the defendant while avoiding overcompensation of the plaintiff. Achieving such a result not only removes any potential incentive for either party to delay settlement but is also in accord with the principles of equity, fairness and justice which inform the "policy, spirit and intent" of R. 4:42-11(b). Kotzian, supra, 152 N.J. Super. at 565; see Busik, supra, 63 N.J. at 383-385 (Conford, J., dissenting); Green v. General Motors Corp., 310 N.J. Super. 507, 534 (App. Div. 1998); Dell'Ava v. H.W. Porter Co., 199 N.J. Super. 127, 129-131 (App. Div. 1985); Espin, supra, 127 N.J. Super. at 496.

The "exceptional circumstances" provision of R. 4:42-11(b)[5] specifically authorizes the judicial suspension of pre-judgment interest in "those cases where an award of interest would neither advance the aim of early settlement nor constitute fair compensation to plaintiff for money withheld and used or presumptively used by defendant. Kotzian, supra, 152 N.J. Super. at 566. If, for the sake of argument, one applies this standard, as a threshold test of the appropriateness of an award

[5] The precise language of the rule is "exceptional cases." See R. 4:42-11(b).

of pre-judgment interest under R. 4:42-11(b),[6] to a purely economic model of pre-judgment interest, it soon becomes clear that allowing pre-judgment interest on future damages[7] does not further the goals of the rule.

The test outlined in Kotzian requires that an award of interest serve neither to induce early settlement nor compensate the plaintiff for money withheld and used by the defendant in order to implicate the "exceptional circumstances" exception. Awarding pre-judgment interest on future damages undeniably overcompensates the plaintiff by requiring the defendant to pay the time value of money not yet due and owing for damages that have not yet accrued. Therefore, pre-judgment interest on future damages does not constitute fair compensation for money withheld and presumptively used by the defendant. Thus, one of the prongs of the Kotzian test for suspending pre-judgment interest has been met with regard to future interest.

With respect to the second prong of the test in Kotzian - whether or not the award in question advances the cause of early settlement - it is arguable that pre-judgement interest on

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[6] As the Supreme Court did in its analysis of pre-judgment interest on future damages in Ruff, supra, 105 N.J. at 245-246.

[7] "Past damages include losses realized between the incident and judgment. Future damages are all losses that will be incurred as a result of the injury but which will not actually accrue until after the judgment is rendered. Future damages include impairment of future earning capacity, pain, mental suffering, cost of future medical care, loss of consortium, and loss of society." Diane Rawson, Reforming Texas Tort Reform: The Case Against Prejudgment Interest on Future Damages, 46 Baylor L. Rev. 1111, 1123 nn.49-50 (1994).

future damages meets the test, as well. As shown above, the compensatory or economic theory of pre-judgement interest dictates that overcompensation of the plaintiff provides an equal incentive for delay on his part as undercompensation of the plaintiff provides to the defendant. Thus, according to that model, overcompensating the plaintiff will create a disincentive to settle on the plaintiff's part, thereby increasing the potential for delay in reaching settlement. Such a result was predicted by Judge Conford in his dissent in Busik, where he noted that the improper application of R. 4:42-11(b) might "well operate to encourage unreasonable recalcitrance on the part of some plaintiffs." Busik, supra, 63 N.J. at 384.

Pre-judgment interest on future damages undeniably overcompensates the plaintiff in that such an award puts the plaintiff in a better position than he would have been in had he received all of the damages due him on the day they accrued as set by R. 4:42-11(b). Because it represents a potential windfall for the plaintiff, pre-judgment interest on future damages serves as a disincentive to early settlement by the plaintiff and, therefore, does not advance the aim of encouraging prompt consideration of settlement possibilities. Thus, pre-judgment interest on future damages satisfies the remaining prong of the Kotzian test for the suspension of pre-judgment interest based on the "exceptional circumstances"

provision of R. 4:42-11(b). In other words, applying the Kotzian test for "exceptional circumstances" (as the Court did in Ruff) to a purely economic model of pre-judgment interest results in the inapplicability of pre-judgment interest to future damages, in contradiction to the outcome in Ruff.[8]

Obviously, despite the predictions of the economic model employed above, a sufficiently excessive award of pre-judgment interest may indeed act coercively to induce a defendant into an earlier settlement on less than favorable terms. Such an award, however, would almost certainly be violative of the injunction against punitive interest in Busik, as well as the spirit of fairness, justice and equity embodied by R. 4:42-11(b). That all pre-judgment interest on future damages may, in fact, be quasi-punitive under the economic model was noted by Judge Dreier in Green, supra, where he stated that "interest on future medical expenses and earnings has been upheld solely on the basis of an inducement to settle, and constitutes a quasi-punishment for not settling." Id., 310 N.J. Super. at 534 n.16

[8] It should be noted here that the above application of "exceptional circumstances" analysis to the question of pre-judgment interest on future damages was merely for the sake of argument as a kind of threshold test. It is not being suggested here that the existence future damages necessarily constitutes an "exceptional circumstance." Rather, though, it is being suggested that awarding pre-judgment interest on future damages is not consonant with the basic spirit, purpose and policy of R. 4:42-11(b), that being the fair and just compensation of the plaintiff and the avoidance of penalizing the defendant, as enunciated in Busik and further delineated in Kotzian. It is the Kotzian analysis that serves the dual purpose not only of setting the parameters of what are "exceptional circumstances" but also of restating the principles of Busik in more precise and less diffuse terms.

(a reference no doubt to the holding in Ruff). Moreover, Judge Pressler has stated that "the underlying purpose and philosophy" of R. 4:42-11(b) is "that prejudgment interest is not a penalty but is rather a payment for the use of money." Pressler, Current N.J. Court Rules, comment 8 to R. 4:42-11 (1999). Thus, post-Ruff, the question remains unanswered as to what degree an award of interest, even one reasonably intended to further the important public interests of early settlement, speedy trials and calendar control, may penalize a defendant, or whether, in fact, an award of interest may be punitive at all, under Busik.

It may be useful here to reproduce the analysis of one legal writer in connection with a Texas statute similar in some ways to the court rule at issue here (the Texas statute differs in that it allows for the tolling of pre-judgment interest if the defendant makes an offer of settlement, in addition to providing for pre-judgment interest on future damages). Arguing that awarding pre-judgment interest on future damages under the statute is a distortion of modern pre-judgement interest theory, based as it is on the notion of compensation and a more purely economic model of interest, and that awarding such interest does not provide an incentive for litigants to settle early, the author writes:

Allowing prejudgment interest on future damages unnecessarily distorts prejudgment interest theory. Under modern prejudgment interest theory, prejudgment interest is a means to achieve full compensation for the plaintiff. Its role in promoting settlements is to take away the defendant's ability to be unjustly enriched by holding the plaintiff's money. Prejudgment interest theory and settlement incentives are two entirely different concepts. The only point at which the two overlap is where prejudgment interest is awarded at the market rate so that defendants have little economic incentive to delay paying the plaintiff. Beyond that point, the use of interest to encourage settlements becomes punishment. Prejudgment interest is not designed to be a form of punishment. Article 5069-1.05 § 6[9] goes beyond the goal of adequately compensating the plaintiff by attempting to punish the defendant by requiring the payment of "interest" on an amount not yet due and owing. The legislature is using prejudgment interest on future

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[9] The author explained the background history of this statute in the following manner:

> In 1985, the Texas Supreme Court decided Cavnar v. Quality Control Parking, Inc.[, 696 S.W. 2d 549 (Tex. 1985).] Cavnar significantly altered Texas law by allowing prejudgment interest in personal injury, wrongful death, and survival actions for the first time. The court allowed prejudgment interest on past damages in these actions for two reasons: first, and most importantly, to provide the plaintiff with full compensation for the injury sustained, and second, to encourage defendants to settle earlier.
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> In 1987, the legislature passed a significant amount of tort reform legislation. The legislature perceived the need to provide more incentives for litigants in personal injury, wrongful death, and property actions to settle suits earlier. Testimony given during senate hearings indicated that unnecessary delay was common in tort actions. Additionally, a closed claim study by the Texas Insurance Board indicated that the Cavnar decision did not have the impact of promoting early settlements that was expected. As a result, the Texas Legislature amended article 5069-1.05 to add section 6 which allows prejudgment interest by statute to provide incentives for litigants in certain tort actions to settle lawsuits earlier.

Rawson, supra (note 2), 46 Baylor L. Rev. at 1111-1114 (footnotes omitted). The subsequent case of C & H Nationwide, Inc. v. Thompson, 903 S.W. 2d 315, 324-327 (Tex. 1994), held that § 6 required pre-judgment interest on future damages. Under Cavnar, non-statutory pre-judgment interest was not recoverable on future damages. Cavnar v. Quality Control Parking, Inc., 696 S.W. 2d 549, 545-555 (Tex. 1985).

damages as a surcharge or penalty on the defendant for not settling early. The result is a plaintiff who is overcompensated on the element of future damages.

The following example will serve to illustrate the difference between properly compensating the plaintiff at the market rate and overcompensating the plaintiff under article 5069-1.05 § 6. Plaintiff was injured on December 31, 1993. Plaintiff files suit on January 1, 1994 and has a favorable judgment rendered on January 1, 1997. Plaintiff incurred $50,000 in damages prior to trial. Assume that the market rate of interest is 10% compounded annually and, therefore, the appropriate discount rate is 10%. Further assume that Plaintiff has $100,000 of future damages that have been discounted to the date of trial. Under the market method of recovery, Plaintiff recovers $166,550, of which $100,000 represents future damages, $50,000 represents past damages, and $16,550 is interest on the past damages. Under the statute, however, Plaintiff recovers $195,000, of which $100,000 represents future damages, $50,000 represents past damages, and $45,000 is statutory interest (computed simply) on the past and future damages. There is a difference of $28,450 between the market recovery and the statutory recovery. As the amount of future damages increases, so does the disparity between the market recovery and the statutory recovery.

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Thus, the result of allowing prejudgment interest on future damages and tolling prejudgment interest on settlement offers is that the statute may have the dual effect of overcompensating the plaintiff on the element of future damages and undercompensating the plaintiff on the element of past damages. Whenever prejudgment interest accumulates and is not tolled under the statute, the plaintiff receives the time value of money for damages that have not yet accrued. However, when the tolling provision is active and prejudgment interest is tolled, the plaintiff does not receive the time value of money for damages that have accrued.

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A system of punishment leading to possible overcompensation, undercompensation, and unjust enrichment is the key to the legislature's plan to provide incentives for cases to settle earlier. If this system alters litigants' behavior by encouraging them to settle earlier, then the distortion of interest theory may be justified. Unfortunately, in addition to upsetting the purity of prejudgment interest theory, article 5069-1.05 § 6 does not accomplish the goal of providing litigants with an incentive to settle earlier in the pretrial process.

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Because prejudgment interest only applies to judgments, the statute, as written and applied, does not encourage "early" pretrial settlements. Like Cavnar, the statute's penalties only provide an incentive to settle at the last moment before prejudgment interest is imposed. The statute contains no provisions for discouraging late settlements and rewarding early settlements. Consequently, defendants can still delay settlement until just before the court renders judgment without incurring a penalty.

In fact, instead of promoting early settlements, the statute provides both plaintiffs and defendants with incentives to delay. Allowing prejudgment interest on future damages discounted only to the date of trial may provide plaintiffs with a tremendous incentive not to settle at all. This would be true when large amounts of future damages will be incurred many years after a trial has ended. Because future damages have not yet accrued and there has not yet been any lost use, delay between filing and judgment increases the amount of pecuniary benefit the plaintiff will receive from a judgment. However, without an award of prejudgment interest on future damages plaintiffs have no incentive to delay because they will receive no more than they actually could have received if they had invested the damages on the date of the injury. The simple solution is to pay plaintiffs only what they actually lost. A prejudgment interest statute which awards interest on an amount not yet lost serves to encourage plaintiffs to avoid settlement in order to receive a windfall.

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> In addition to giving litigants incentives to delay, the statutory penalty of prejudgment interest on future damages has the unintended effect of punishing litigants whose cases are inappropriate for settlement. Some cases need to go to trial. For example, when there are real questions of disputed liability, questions of emerging liability, issues of joint tortfeasor liability, questions of the extent of an injury, or questions of insurance coverage, the litigants need the assistance of the judicial system to resolve their dispute adequately. While promoting settlements is an admirable goal, allowing prejudgment interest on future damages as a penalty does not further that goal when the litigants genuinely need to go to trial to resolve their dispute properly. An incentive to settle only works when the litigants have a case that is capable of settling. Cases where settlement is not appropriate based on the issues involved still come within the penalty provision set by the statute. The goal is not to punish litigants who need to go to trial, but to aim settlement incentives toward those litigants who know they will settle but wait until the last possible moment to do so. To be effective, an incentive to settle must be directed toward the right litigants.
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> Unfortunately, article 5069-1.05 creates problems that are inconsistent with the legislature's goal to encourage litigants to settle earlier. By using punishment to increase early settlements, the enactment actually hinders the possibility that litigants will settle any earlier than they did under Cavnar.

Rawson, supra (note 2), 46 Baylor L. Rev. at 1130-1135 (footnotes omitted).

With respect to future pain and suffering awards, it is worthwhile to look at how the subject has been dealt with in one jurisdiction where the question has recently arisen, Massachusetts. In Brayman v. 99 West, Inc., 116 F. Supp. 2d

225, 236-237 (D. Mass. 2000), the federal district court, applying Massachusetts law, reasoned as follows:

> As noted by the SJC, the primary purpose of section 6B [the Massachusetts pre-judgment interest statute] is to compensate the injured party "for the loss of use or the unlawful detention of money." Conway v. Electro Switch Corporation, 402 Mass. 385, 523 N.E. 2d 255, 258 (1988). Consequently, the statute does not encompass prejudgment interest on damages which are for losses incurred in the future. See Conway v. Electro Switch Corporation, 523 N.E. 2d at 256 (construing section 6B to preclude damages for front pay in employment discrimination suit inasmuch as SJC saw "no justification for adding interest to damages which, by definition, are for losses to be incurred in the future").
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> It is true that, under the statute, future lost wages are treated as an already incurred loss and therefore subject to an award of prejudgment interest in personal injury cases. Kuppens v. Davies, 38 Mass. App. Ct. 498, 649 N.E. 2d 164, 165, review denied, 420 Mass. 1105, 651 N.E. 2d 410 (1995); see Commonwealth v. Johnson Insulation, 425 Mass. 650, 682 N.E. 2d 1323, 1334 (1997) ("in the case of personal injury, prejudgment interest is to be awarded for the loss of earning capacity, even though it is future income that is affected by that loss"). Damages for future pain and suffering and loss of enjoyment of life, however, compensate for losses to be incurred in the future and therefore fall outside the reach of section 6B.
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> In order to prevent a potential windfall to the plaintiff under the statute, see generally St. Paul Surplus v. Feingold & Feingold, 427 Mass. 372, 693 N.E. 2d 669, 673 (1998) (reasoning that calculation under section 6B which would provide the plaintiff with windfall should be avoided "as a matter of fairness"), it is incumbent upon the defendant to request an itemization of a compensatory damages award for future emotional distress. See McCarthy v. The Ground Round, 1998 WL 726604 at *3-4 (Mass. Super. Oct.15, 1998). [FN21]

> Defendant did not request an itemization of the compensatory damages. Accordingly, prejudgment interest shall be awarded on the entire $25,000 amount.
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> FN21. As reasoned by the court in McCarthy,
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> If a defendant wishes to prevent a plaintiff from receiving excessive interest for lost back pay he can accomplish this by requesting that the jury in its special verdict itemize for each year the amount of back pay that is due.
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> McCarthy v. The Ground Round, 1998 WL 726604 at *3-4 (Mass. Super. Oct. 15, 1998). The court then applied this same reasoning to the nonitemized past and future damages for emotional distress and awarded prejudgment interest on the entire amount. See McCarthy v. The Ground Round, 1998 WL 726604 at *3-4 (Mass. Super. Oct. 15, 1998).

What is interesting under the Massachusetts schema is that pre-judgment interest is allowable on future lost wages under the theory that the loss of earning capacity that occasions such damages relates back to the date of the original injury; but pre-judgment interest is not allowable on awards for future pain and suffering in that those damages compensate for losses that are only incurred in the future. However, if the defendant does not request the jury to itemize its award of compensatory damages, thereby segregating the future damages from the past, the court will award pre-judgment interest on the entire lump-sum amount.

It is not being suggested herein that New Jersey follow the Massachusetts regime. What is being sought to be demonstrated is the divergence of opinion one encounters on the question of

pre-judgment interest the farther one strays from adherence to a purely economic model. In Massachusetts, damages for future lost earnings are considered to accrue as of the time that there is a permanent loss of earning capacity even though the plaintiff will incur no opportunity cost for loss of use of the money prior to judgment. Here in New Jersey, it is the sentiment of most on our Committee that there is no economic rationale to awarding prejudgment interest on future lost wages. Yet, it has also been proposed by some of our fellow Committee members that pre-judgment interest be allowed on awards of damages for future pain and suffering, a policy for which the Massachusetts Supreme Judicial Court found absolutely "no justification," since such damages are only incurred in the future. Again, the economic model is clear that pre-judgment interest on future pain and suffering presents a windfall to the plaintiff and can only serve to discourage rather than encourage prompt consideration of settlement possibilities.

A casual (and far from exhaustive) search of the case law seems to indicate that more jurisdictions prohibit pre-judgment interest on future pain and suffering than permit such awards. Pre-judgment interest on future pain and suffering is specifically disallowed under general maritime law and in Jones Act cases whether or not brought "in admiralty" (i.e., whether tried before a judge or a jury).

It should be noted that whether or not future pain and suffering awards are now discounted to present value (as of the date of judgment) is not the question; the point is these awards are for future damages, and, therefore, simply do not generate pre-judgment interest (whether they are discounted to the time of trial or not). More to the point is whether the jury interrogatories should be reformed to require juries to separate pain and suffering damages into past and future categories. There seems to be no reason why (nor has our research turned up any judicial opinion or decision to the effect that) such a change would present any increased difficulty to the jury or overcomplicate the jury's task. Since the evidence of past and future pain and suffering is presented to the jury separately and at different times in the trial, it would seem to make the jury's task easier rather than harder to allow the jury members to make separate findings. This would only serve to help the jury deal with the vast amount of data that they must handle in order to render their verdict. In general, the jury's job is made more approachable the more the jurors are allowed to focus their attention on bite-sized, discrete bits of information -- this is the reasoning behind the use of special interrogatories in the first place) -- the first main breakdown being that between past and future damages.

I hope this is helpful, or at least thought provoking.

See accompanying chart, "Demonstration of Present Value Concepts in Computing Awards for Past and Future Damages"

Assumptions:

- Date of injury - December 31, 2000.
- Damages - $10,000 per year for fifteen years, considered incurred on the last day of each year, first year of damage 2001.
- Rate used for computation of prejudgment interest and present value discount - 10% compounded annually. [Compounded interest is used by experts in computing present value to determine the amount of money that must be invested at present to fund an annuity, since interest left in the fund will continue to accrue further earnings. While simple interest is used to compute prejudgment interest in New Jersey courts, we used compounded interest (the exact same rate and terms used for the present value discounting) in this computation in order to better demonstrate the mathematical equivalence of the two different methods used to compute the final award. The difference is small.]
- The six-month interest hiatus was ignored.

Explanation:

The chart presents the computation of the total award, inclusive of interest on past damages and net of discounts to present value for future damages, where "present" is alternatively defined as December 31, 2000 (the date of injury), and December 31 of the three subsequent years.

Note that in the hypothetical situation where justice is dispensed on the same day as the injury, December 31, 2000 (the first group of columns, in bold), the present value of fifteen $10,000 annual damage amounts is $76,061. In this situation, there is no prejudgment period and no past damages.

In the second, third, and fourth groups of columns, we assumed that the verdict would be rendered on December 31, 2001, 2002, and 2003 respectively. In these presentations, we *added interest on the awards for past damages only*, and discounted the future damages to the verdict date. The computed awards, $83,667, $92,034, and $101,237 respectively, differed from the hypothetical and from each other only as a result of the passage of time. In other words, they are *financially equivalent*.

This equivalence can be demonstrated (and mathematically proven) by simply adding interest (prejudgment interest) to the damage amounts which have been discounted to the date of injury (not the date of verdict as juries are directed to do), totaling $76,061. Note that when this is done, the results equal the computations wherein no prejudgment interest was added to awards for future damages that were discounted back only to the date of verdict. This proof, simply an alternative method to arrive at the same mathematical result, is precisely the approach suggested by the Court in *Jones & Laughlin Steel*.

Denying prejudgment interest in the case of awards for future damages that were discounted back only to the date of verdict is mathematically correct. To do otherwise would be to pay interest twice (or viewed alternatively, double the interest rate) during the prejudgment period.

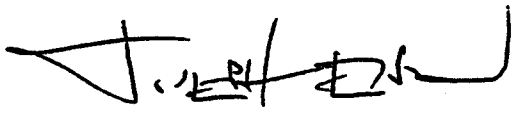
It is both easier and more precise to discount the entire lost stream of earnings back to the date of injury - the moment from which earning capacity was impaired. The plaintiff may then be awarded interest on that discounted sum for the period between injury and judgment, in order to ensure that the award when invested will still be able to replicate the lost stream."

Attached are computations and an accompanying explanation which, I hope, will demonstrate these points conclusively.

As to public policy of encouraging settlements, I would ask (as someone not trained in the law) whether it is only defendants that need such encouragement. Awarding prejudgment interest for future damages which have been discounted only to the date of verdict, tantamount to doubling the interest rate for the period from injury to verdict, serves as a counter-incentive to settlement on the part of the Plaintiff.

Please let me know if I can provide any further assistance.

Respectfully,



Joseph C. Eisen

Demonstration of Present Value Concepts in Computing Awards for Past and Future Damages

		Date of Verdict											
		December 31, 2000			December 31, 2001			December 31, 2002			December 31, 2003		
Date	Absolute Amount	Interest on Past Damages	(Discount) on Future Damages	Award	Interest on Past Damages	(Discount) on Future Damages	Award	Interest on Past Damages	(Discount) on Future Damages	Award	Interest on Past Damages	(Discount) on Future Damages	Award
31-Dec-00													
31-Dec-01	10,000	-	(909)	9,091	-	-	10,000	1,000	-	11,000	2,100	-	12,100
31-Dec-02	10,000	-	(1,736)	8,264	-	(909)	9,091	-	-	10,000	1,000	-	11,000
31-Dec-03	10,000	-	(2,487)	7,513	-	(1,736)	8,264	-	(909)	9,091	-	-	10,000
31-Dec-04	10,000	-	(3,170)	6,830	-	(2,487)	7,513	-	(1,736)	8,264	-	(909)	9,091
31-Dec-05	10,000	-	(3,791)	6,209	-	(3,170)	6,830	-	(2,487)	7,513	-	(1,736)	8,264
31-Dec-06	10,000	-	(4,355)	5,645	-	(3,791)	6,209	-	(3,170)	6,830	-	(2,487)	7,513
31-Dec-07	10,000	-	(4,868)	5,132	-	(4,355)	5,645	-	(3,791)	6,209	-	(3,170)	6,830
31-Dec-08	10,000	-	(5,335)	4,665	-	(4,868)	5,132	-	(4,355)	5,645	-	(3,791)	6,209
31-Dec-09	10,000	-	(5,759)	4,241	-	(5,335)	4,665	-	(4,868)	5,132	-	(4,355)	5,645
31-Dec-10	10,000	-	(6,145)	3,855	-	(5,759)	4,241	-	(5,335)	4,665	-	(4,868)	5,132
31-Dec-11	10,000	-	(6,495)	3,505	-	(6,145)	3,855	-	(5,759)	4,241	-	(5,335)	4,665
31-Dec-12	10,000	-	(6,814)	3,186	-	(6,495)	3,505	-	(6,145)	3,855	-	(5,759)	4,241
31-Dec-13	10,000	-	(7,103)	2,897	-	(6,814)	3,186	-	(6,495)	3,505	-	(6,145)	3,855
31-Dec-14	10,000	-	(7,367)	2,633	-	(7,103)	2,897	-	(6,814)	3,186	-	(6,495)	3,505
31-Dec-15	10,000	-	(7,606)	2,394	-	(7,367)	2,633	-	(7,103)	2,897	-	(6,814)	3,186
	150,000	-	(73,939)	76,061	-	(66,333)	83,667	1,000	(58,966)	92,034	3,100	(51,863)	101,237

Present Value		
	31-Dec-00	76,061
2001 Interest		7,606
	31-Dec-01	83,667
2002 Interest		8,367
	31-Dec-02	92,034
2003 Interest		9,203
	31-Dec-03	101,237